Nos. 14-840, 14-841

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In The
Supreme Court of the United States

FEDERAL ENERGY REGULATORY COMMISSION,

Petitioner,

v.

ELECTRIC POWER SUPPLY ASSOCIATION, ET AL.,

Respondents.

EnerNOC, INC., ET AL.,

Petitioners,

v.

ELECTRIC POWER SUPPLY ASSOCIATION, ET AL.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

RESPONDENT CALIFORNIA PUBLIC UTILITIES COMMISSION'S REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. STATES THAT FILED *AMICI CURIAE* BRIEFS AGAINST PETITIONERS ARE NOT AGGRIEVED BY ORDER 745, BECAUSE THE FERC DOES NOT REQUIRE RETAIL DEMAND RESPONSE PARTICIPATION IN WHOLESALE MARKETS 4

II. VACATING ORDER 745 DEPRIVES MANY STATES THAT SEEK TO ALLOW BIDDING OF RETAIL DEMAND RESPONSE INTO WHOLESALE MARKETS OF THE FULL BENEFITS OF DEMAND RESPONSE 7

III. STATES THAT CHOOSE TO ALLOW DIRECT BIDDING OF DEMAND RESPONSE INTO WHOLESALE MARKETS SHOULD NOT BE DEPRIVED OF THE DISTINCT BENEFITS OF DEMAND RESPONSE IN WHOLESALE MARKETS 10

CONCLUSION 11

TABLE OF AUTHORITIES

Page

FEDERAL COURT CASES

Conn. Light & Power Co. v. FPC, 324 U.S. 515 (1945) 8, 9

Electric Power Supply Ass'n v. FERC, 753 F.3d 216 (D.C. Cir. 2014) 3, 6

New York State Dept. of Social Services v. Dublino, 413 U.S. 405 (1973) 10

FEDERAL STATUTES AND RULES

Federal Power Act

Section 3(15), 16 U.S.C. § 796(15) 1

Section 201(b), 16 U.S.C. § 824(b) 2, 3

Sup. Ct. R. 25.3 1

FERC DECISIONS AND ORDERS

Demand Response Compensation in Organized Wholesale Energy Markets (Order 745), 134 FERC ¶ 61,187; 2011 FERC LEXIS 525 ..... *passim*

Wholesale Competition in Regions with Organized Electric Markets (Order 719), 73 Fed. Reg. 64100 (October 28, 2008) 6

Pursuant to Sup. Ct. R. 25.3, Respondent California Public Utilities Commission (California PUC) respectfully submits its reply brief on the merits in support of Federal Energy Regulatory Commission (FERC) jurisdiction over retail demand response bid directly into the wholesale market.

INTRODUCTION

There are two groups of representatives of the States before this Court, which are distinguished by whether they filed briefs on the merits supporting the position of the Petitioners in July, 2015 or whether they filed briefs supporting the position of Respondents Electric Power Supply Association (EPSA), *et al.*, in September, 2015. The first group consists of State commissions[1] from California (*i.e.*, the California PUC), as well as Maryland and Pennsylvania (Joint States), which separately filed in this Court on July 9, 2015 Respondents' briefs on the merits supporting the Petitioners, and which were active parties in proceedings before the court and the FERC below. This first group also includes representatives of ratepayers from the States of Delaware, Illinois, Indiana, Maryland, New Jersey, Pennsylvania and

[1] Section 3(15) of the Federal Power Act (FPA), 16 U.S.C. § 796(15), defines a State commission as a "regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of electric energy to consumers within the State or municipality[.]"

West Virginia and Washington, D.C., which jointly filed on July 16, 2015 an *Amici Curiae* brief supporting the position of Petitioners. (Hereinafter, this group will be referred to collectively as the "States Supporting FERC").

The second group consists of representatives of States, who admittedly have never been active in these proceedings before the court or the FERC below, but have filed in this Court on September 8, 2015 *Amici Curiae* briefs supporting the position of Respondents EPSA, *et al.*[2] The State *Amici* Supporting EPSA, like Respondent EPSA itself, have argued in favor of States' rights, and have maintained that under Section 201(b) of the Federal Power Act (FPA), 16 U.S.C. § 824(b), Congress preserved the States' sovereign right to regulate the retail energy markets. They argue that each State has a greater familiarity with the concerns of their local electricity consumers than does the federal government. The California PUC agrees that principles of cooperative federalism, which underlie both the United States Constitution and the FPA, support each State deciding how to regulate demand response within its

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[2] Except for the New York State Public Service Commission, none of the other State *Amici* Supporting EPSA participated in the FERC proceedings leading to Order 745. *See Demand Response Compensation in Organized Wholesale Energy Markets* (Order 745), Appendix (List of Commenters) 134 FERC ¶ 61,187 (2011); 2011 FERC LEXIS 525.

borders. (Hereinafter, this group will be referred to collectively as the "State *Amici* Supporting EPSA").

The Majority Opinion of the Court below[3] and the arguments of the State *Amici* Supporting *EPSA*, would prevent States that choose to allow retail customers to bid demand response into wholesale markets. As discussed in greater detail below, in its Order 745[4] and the FERC's prior orders addressing demand response, the FERC respected States' rights. Therefore, FERC did not attempt to preempt States that do not want their electric utilities' retail customers to bid into the wholesale markets. The State *Amici* Supporting EPSA have the authority to, and have demonstrated with numerous examples, how they have exercised their power to prevent their electric utilities' retail customers from bidding their demand response capabilities into the wholesale markets. State *Amici* Supporting EPSA, however, have never explained how they could thwart States Supporting FERC, such as California, Maryland and Pennsylvania, from exercising *our States' rights* to have retail customers in our States bid demand response into the wholesale markets. Because under Section 201(b) of the Federal Power Act, 16 U.S.C. § 824(b), only FERC can regulate the wholesale market, the position of

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[3] *Electric Power Supply Ass'n v. FERC*, 753 F.3d 216 (D.C. Cir. 2014), Solicitor General's Appendix (SG App.) at 1a-17a.

[4] *Demand Response Compensation in Organized Wholesale Energy Markets*, 134 FERC ¶ 61,187; 2011 FERC LEXIS 525 at PP 114-115, SG App. at 49a-172a.

State *Amici* Supporting EPSA and the Majority Opinion of the Court below would prevent the States Supporting FERC from receiving the widespread benefits of demand response dispatched through wholesale markets, as well as the concomitant lower prices in such markets and increased grid reliability. According to generally accepted economic principles, lower market prices are a natural result of increased market participants (*i.e.*, both suppliers of electricity and demand responders) competing in that market. Such benefits explain why representatives of retail ratepayers in other States, such as Delaware and Illinois, also filed an *Amici* brief on July 16, 2015 in favor of the Petitioners.

I. STATES THAT FILED *AMICI CURIAE* BRIEFS AGAINST PETITIONERS ARE NOT AGGRIEVED BY ORDER 745, BECAUSE THE FERC DOES NOT REQUIRE RETAIL DEMAND RESPONSE PARTICIPATION IN WHOLESALE MARKETS

State *Amici* Supporting EPSA fail to identify how they are aggrieved by FERC Order 745. The Brief of *Amici* North Carolina Public Utilities Commission, Idaho Public Utilities Commission, South Carolina Office of Regulatory Staff, South Dakota Public Utilities Commission, Alabama Public Service Commission, Louisiana Public Service Commission, Arizona Corporation Commission, Georgia Public Service Commission, and the Kansas Corporation Commission in

Support of the Respondents (North Carolina Br.) states that under Order 745 the FERC's system of direct bidding of retail demand response into wholesale markets interferes with States' balancing between customer classes for the purposes of determining retail rates. (North Carolina Br. at 2.) This discussion fails to acknowledge that Order 745 only operates in States that allow demand response to bid into wholesale markets.

The Brief of Indiana, Oklahoma, and Ten States as *Amici Curiae* in Support of the Respondents (Indiana Br.) demonstrates the lack of harm caused to states that select not to make use of Order 745: "After FERC finalized the rule with the original opt-out provision included, several states, including *amici* Iowa, Indiana, Missouri, and Michigan, issued opt-out orders prohibiting or restricting aggregators from bidding retail demand response into wholesale markets without going through the appropriate retail electric utility." (cites of State commission orders omitted). (Indiana Br. at 11-13.) The Indiana Brief then claims that Order 745 set retail rates for energy. (Indiana Br. at 14-15.) This simply is not true: Order 745 set only wholesale rates for demand response bid into wholesale markets from retail customers from States that choose to allow such direct bidding. As observed by the Dissenting Opinion in the Court below, "[t]here is a carve-out from the compensation requirement for ISOs and RTOs in States where local regulatory law stands in the way. Thus, Order 745

preserves State regulation of retail markets. This is hardly the stuff of grand agency overreach." *Electric Power Supply Ass'n v. FERC*, 753 F.3d at 233. (SG App. at 33a.) The terminology of whether States may opt-in or opt-out of Order 745 is immaterial, as non-participating States are not aggrieved.

As discussed by the California PUC in its Brief on the Merits, Order 745, which followed and built upon Order 719,[5] does not force any State to allow any of its retail consumers to participate in direct bidding of demand response into wholesale markets. (California Br. at 2, 17.) Rather, Order 719 required independent system operators (ISOs) or Regional Transmission Organizations (RTOs) to grant access to third-party aggregators of retail customers (ARCs), except where "the laws or regulations of the relevant electric retail regulatory authority do not permit the customers aggregated [by the ARC] to participate." (Order 719 at P 155.) FERC stated that its "intent was not to interfere with the operation of successful [retail] demand response programs, [to] place an undue burden on state and local retail regulatory entities, or to raise new concerns regarding federal and state jurisdiction." *Id.* FERC made clear that it would not "require a [state regulator] to make any showing or take any action in compliance with [Order 719]," nor place the system operator "in the position of interpreting the laws or regulations" of any state. (*Id.*

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[5] *Wholesale Competition in Regions with Organized Electric Markets* (Order 719), 73 Fed. Reg. 64100 (October 28, 2008).

at P 155.) Similarly, FERC's Order 745 at PP 114-115 expressly acknowledged that it was not designed to take any authority from States:

> [W]e recognize that jurisdiction over demand response is a complex matter that lies at the confluence of state and federal jurisdiction. By issuing this Final Rule, the Commission is not requiring actions that would violate state laws or regulations. The Commission also is not regulating retail rates or usurping or impeding state regulatory efforts concerning demand response. [¶] We acknowledge that many barriers to demand response participation exist and that our ability to address such barriers is limited to the confines of our statutory authority.

Thus, States that choose not to allow their retail customers to participate in direct bidding of demand response into wholesale markets will not be affected as they claim.

II. VACATING ORDER 745 DEPRIVES MANY STATES THAT SEEK TO ALLOW BIDDING OF RETAIL DEMAND RESPONSE INTO WHOLESALE MARKETS OF THE FULL BENEFITS OF DEMAND RESPONSE

The State *Amici* Supporting EPSA argue that this Court must protect States' rights over their authority to determine retail electric rates. (*See, e.g.*, Indiana Br. at 7-8, North Carolina Br. at 4-8). The

Indiana Brief argues "When Congress has gone to great lengths to honor the principles of federalism, the Court should not lightly defer to an agency's attempts to encroach on State authority." (Indiana Br. at 16.) The California PUC agrees with these principles. While EPSA references *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515, 530, it fails to recognize that the concept of "States' rights" under the FPA necessarily allows that different States will likely select different choices. As explained by this Court in *Connecticut Light & Power Co.*:

> Congress is acutely aware of the existence and vitality of these state governments. It sometimes is moved to respect state rights and local institutions even when some degree of efficiency of a federal plan is thereby sacrificed. [. .] Congress may think complete centralization of control of the electric industry likely to overtax administrative capacity of a federal commission. It may, too, think it wise to keep the hand of state regulatory bodies in this business, for the *"insulated chambers of the states" are still laboratories where many lessons in regulation may be learned by trial and error on a small scale without involving a whole national industry in every experiment.*

Id. at 530 (emphasis added).

State *Amici* Supporting EPSA, however, fail to address the CPUC's discussion that principles of

cooperative federalism included in the Federal Power Act (FPA) and respected by the FERC in Order 745, protect States' authority to allow or prohibit their retail customers to participate in wholesale energy markets. (*See* California PUC Br. at 7-11.) Although the FPA did not explicitly use the term "cooperative federalism," in *Connecticut Power & Light Co. v. FPC*, 324 U.S. at 526, this Court described the FPA as having recognized, maintained and aided State regulatory commissions efforts. *Connecticut Power & Light Co.* also described the FPA as having directed the FERC to receive and consider the views of State commissions regarding decisions under FERC control. *Id.*

No party or *amici* challenged the point that Congress intended to allow states and the federal government to work collaboratively. California and other States Supporting FERC simply seek to pursue such collaboration as intended by Congress and affirmed by this Court.

Further, California and other States need the FERC to establish wholesale structures in order for demand response to be bid directly into FERC-regulated wholesale markets, as States have no authority to set wholesale rates, terms and conditions of service. No one questions FERC jurisdiction over wholesale markets. Therefore, the States that seek retail demand response participation in wholesale markets need the FERC to develop tariff language

to allow such participation. (See California PUC Br. at 7.) This is just what Order 745 did.

As discussed in the California PUC brief on the merits, the term "cooperative federalism" has been used by this Court to describe laws relying upon coordinated State and Federal efforts within a complementary administrative framework. *New York State Dept. of Social Services v. Dublino*, 413 U.S. 405, 413, 421 (1973). The California PUC would simply like to use its authority over retail electric markets to work cooperatively with the FERC under the auspices of Order 745 to allow volunteer retail customers to coordinate their demand response with the wholesale energy markets.

III. STATES THAT CHOOSE TO ALLOW DIRECT BIDDING OF DEMAND RESPONSE INTO WHOLESALE MARKETS SHOULD NOT BE DEPRIVED OF THE DISTINCT BENEFITS OF DEMAND RESPONSE IN WHOLESALE MARKETS

The California PUC agrees with the Brief of Grid Engineers and Experts as *Amici Curiae* in Support of Neither Party (Grid Engineers Br.) that retail demand response bid into wholesale markets can provide qualitatively different services than demand response resources that are not integrated into wholesale market balancing structures. As stated by the Grid Engineers, *et al.*, demand response bid into a wholesale market "may be a provider of reliability

services (*i.e.*, "ancillary services"), either providing real-time response at the grid operators' command to rebalance the grid in the event of an emergency outage, or supplying regulation, meaning the second-to-second balancing of net demand with net supply under the grid operator's automatic control." (Grid Engineers Br. at 15.) Stated more simply, demand response resources and generation resources "are comparable for purposes of balancing supply and demand in wholesale electricity markets over all time scales from cycles to hours." (Grid Engineers Br. at 17.) Further, "Balancing the grid by controlling only the generation facilities can be costly and inefficient." (Grid Engineers Br. at 18.) Thus, demand response bid into wholesale markets "provid[es] additional flexibility that generation alone cannot provide." (Grid Engineers Br. at 19.)

CONCLUSION

For the reasons discussed above, California PUC respectfully requests that the Court vacate the Majority Opinion of the U.S. Court of Appeals for the D.C. Circuit and find that the FERC possesses authority to

regulate demand response that is bid into wholesale markets pursuant to state authorization.

Respectfully submitted,

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